Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of State and Local Governments	)	WT Docket No. 19-250
	)	
	)	
Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	RM-11849
	)	
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.

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EXECUTIVE SUMMARY

Crown Castle International Corp. ("Crown Castle") applauds the significant progress this Commission has made in streamlining the deployment of wireless infrastructure and technology to meet our country's challenge to win the race to 5G. A critical component of these efforts are the Commission's regulations implementing the Congressional mandate of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Section 6409"). These regulations provide a necessary framework for the deployment of wireless transmission equipment on existing infrastructure. Approved by the Commission on October 17, 2014, and effective on April 5, 2015, the Section 6409 regulations have been operative for almost five years. With the benefit of operating under Section 6409 for such time, Crown Castle submits these Comments in support of the Petitions of WIA for a Declaratory Ruling and Rulemaking and the Petition for a Declaratory Ruling of CTIA which will further facilitate the rapid deployment of wireless technology.

Access to utility infrastructure has likewise been critical to the deployment of wireline and wireless telecommunications services, with 47 U.S.C. § 224 ("Section 224") and its regulations ensuring access for third-party attachers. As next generation services are deployed under this framework, clarification from the Commission on issues such as access to utility light poles, impermissible prohibitions and restrictions on access, and other issues related to pole attachment agreements and construction standards will aid stakeholders' understanding of these matters and concurrently expedite deployment. For these reasons, Crown Castle supports the Petition for Declaratory Ruling of CTIA on Section 224 and urges the adoption of the relief requested therein.

Taken together, these Petitions present this Commission with an opportunity to continue its important work by providing regulatory certainty and fostering an environment of clarity and collaboration for our nation's wireless networks and supporting infrastructure.

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Crown Castle submits these comments in response to the Petition for Rulemaking and the Petition for Declaratory Ruling filed by the Wireless Infrastructure Association ("WIA"),[1] and Petition for Declaratory Ruling filed by CTIA[2] (collectively, the "Petitions"). By Public Notice dated September 13, 2019,[3] the Federal Communications Commission ("Commission") sought public comment on the Petitions, which seek clarification of existing rules ("6409 Rules")[4] related to Section 6409[5], clarification of rules related to Section 224,[6] and request amendment of the Commission's existing Section 6409 Rules. The Petitions have been

[1] WIA Petition for Declaratory Ruling (filed August 27, 2019); WIA Petition for Rulemaking (filed August 27, 2019).
[2] CTIA Petition for Declaratory Ruling (filed Sept. 6, 2019) ("CTIA Petition").
[3] *Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling, Public Notice*, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849, DA 19-913 (released Sept. 13, 2019) ("Public Notice").
[4] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014) ("2014 Order"), aff'd, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015), codified at 47 CFR § 1.6100 (originally codified as 47 CFR § 1.40001 and later redesignated as § 1.6100 (with no substantive changes). *See* 83 FR 51697, 51886 (October 15, 2018).
[5] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI, § 6409(a), 126 Stat. 156 (Feb 22, 2012) (codified at 47 U.S.C. § 1455(a)).
[6] 47 U.S.C. § 224.

combined into a single docket.[7]

I. Introduction and Summary

A. Crown Castle Has a Unique Perspective.

Crown Castle remains at the forefront of our nation's broadband revolution, deploying fiber optic and wireless infrastructure that will serve as the backbone for the broadband networks of the future. Crown Castle has more than twenty-five years of experience building and operating network infrastructure. With more than 40,000 towers, 60,000 small wireless facilities constructed or under contract and more than 75,000 route miles of fiber, Crown Castle is the country's largest independent owner and operator of shared infrastructure. From its more than 100 offices around the nation, Crown Castle partners with wireless carriers, technology companies, broadband providers and municipalities to design and deliver unique end-to-end infrastructure solutions that bring new innovations, opportunities, and possibilities to people and businesses around the country.

As owner, operator or manager of such a wide range of wireless infrastructure assets, Crown Castle interacts daily with state and local jurisdictions and utilities regarding a variety of issues, including non-EFR siting approvals and other permitting and regulatory issues related to towers, small wireless facilities and fiber. In an effort to site tens of thousands of small wireless facilities across the country, Crown Castle is also engaged with investor-owned utilities and other pole owners in many states to gain access to existing utility poles. Additionally, Crown Castle provides services to its customers and collocators on these sites, including in some instances, working on their behalf to obtain local government approvals for the ongoing collocation,

[7] The Commission assigned RM-11849 to WIA's Rulemaking Petition. WIA's Declaratory Ruling Petition was filed in WT Docket 17-79. The CTIA Petition was filed in WT Docket 17-79 and WC Docket 17-84. The Commission has opened a new docket, WT 19-250 and combined the petitions into a single docket. *See* Order Granting Extension of Time, (adopted September 30, 2019), WT Docket No 19-25, RM-11849, WC Docket No. 17-84.

replacement and removal of equipment needed to develop and upgrade networks. In this capacity, Crown Castle engages with utilities for the attachment of its network infrastructure and applies Section 6409 on a daily basis, working with many thousands of local jurisdictions and other pole owners. Accordingly, Crown Castle is in a unique position to speak to the patterns of issues that frequently arise and interfere with the regulatory certainty needed to efficiently deploy wireless technology.

B. Clarification and Additional Guidance Will Provide Much-Needed Regulatory Certainty.

In order for wireless networks to be constructed, carriers must work with two primary stakeholders that have the power to significantly slow the progress of construction and modification: local jurisdictions and other utility pole owners. Despite the clear, preemptive federal laws and rules developed by the Commission on this issue, statutes and rules are susceptible to ambiguity. From the genesis of its rules implementing both Section 6409 and Section 224, the Commission has recognized that conflict arising from statutory ambiguities may significantly undermine the goal and foundation of the statutes.[8]

Crown Castle provides the comments herein in support of the relief requested in the Petitions and to further delineate the actions the Commission should take to resolve existing ambiguities in practice under Section 6409 and Section 224.

II. Further Clarification of the Scope of Section 6409 is in the Public Interest.

In enacting Section 6409, Congress provided a straightforward and conceptually simple mandate that eligible facilities requests ("EFRs") must be approved and may not be denied by state

[8] *See, e.g., In the Matter of Acceleration of Broadband Deployment by Improving Wireless Siting Policies*, WT Docket No. 13-328; *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket 11-59; 2012 *Biennial Review of Telecommunications Regulations*, WT Docket No. 13-32, FCC 14-153; 2014 Order ¶ 135.

and local governments, while preserving the ability of those jurisdictions to dictate their own local application processes. Although the mandate is simple, complications arise in practical application as a result of the interplay between existing local ordinances and federal law.

Despite best prior efforts to eliminate ambiguity, differing interpretations of remaining undefined or ambiguous terms in the 6409 Rules continue to prolong the EFR approval process. In many instances, applicants and local governments legitimately arrive at differing results based on conflicting interpretation of uncertain provisions. In others, local governments ignore or actively resist the federal mandate and the Commission's implementation of such mandate. Both circumstances lead to delay and inefficient use of resources as the parties work to resolve disagreements. Both circumstances compel Crown Castle to support the Petitions seeking regulatory certainty grounded in objective standards.

The Commission's elucidation of its intent regarding the 6409 Rules will have a direct impact on both governments and applicants as each will have a clearer understanding of their respective rights and obligations under Section 6409 and can act accordingly. Additional guidance and rulemaking will serve the public interest by reducing the delay and resources invested in what should be relatively easy administrative review. The requested clarification will further the Commission's original intent of providing objective guidance to all stakeholders under Section 6409, facilitate the review process for wireless infrastructure modifications, and accelerate wireless broadband deployment consistent with the Commission's statutory responsibilities.[9]

In previous filings,[10] Crown Castle highlighted the practices of local governments that

[9] *See* 2014 Order at ¶ 135.

[10] *See, e.g.*, Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WT Docket No. 16-421 (filed June 7, 2018); Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WT Docket No. 16-421 (filed August 10, 2018) ("Crown Castle August 10, 2018 Ex Parte Letter"); Letter from Joshua S. Turner, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC (filed June 17, 2019).

hinder the application of Section 6409, such as applying improper conditions on EFRs, erroneously applying application requirements that are unrelated to determining whether a request constitutes an EFR, seeking information that is unrelated to the determination of whether a request is an EFR, and simply denying EFR applications without justification. We refer the Commission to these filings as the noted practices are patterns that continue to date in many jurisdictions throughout the country and incorporate these prior filings with respect to Section 6409.

A. Jurisdictions Requiring Multiple Approvals Often Defeats the Shot Clock.

Although many state and local governments have enacted federally-compliant and complementary codes to streamline the process of reviewing EFRs, others continue to impose the same requirements on EFRs as they do for all other wireless siting approvals. As a result, EFRs are often required to go through multiple approval processes under local law before an applicant can proceed to construction. These processes are frequently consecutive processes involving multiple departments. Often, an applicant may not even be permitted to file for certain approvals until prior approvals from the same jurisdiction have been obtained.

The most common example is where a jurisdiction requires an EFR to obtain an approval from a planning or zoning department before the applicant may apply for a building or construction permit. Other jurisdictions may require even more approvals. For example, one township in New York first requires an applicant to obtain a planning approval before applying for and obtaining architectural board approval, prior to applying for a building permit. A county in California requires the routing of an EFR to all departments for review, even departments that are inapplicable to EFR approvals. After a pre-application process, a town in Massachusetts requires multiple planning board meetings, fire department approval, health department approval, and tax department approval before building permits will even be considered. These jurisdictions are not

anomalies – multiple approval processes are a common practice.

In many jurisdictions, a locality may respect the shot clock for the initial zoning or planning approval, but then disregard any time constraints for any subsequent approvals. In other jurisdictions, an applicant may issue a deemed granted notice for a planning or zoning approval, but then be subsequently unable to obtain a building permit because the building department refuses to proceed without actual approval from the planning or zoning department. In either event, applicants are put in a position of having to attempt to negotiate the release of permits, initiate litigation, or assert the beginning of a new shot clock – all options that cause delay and thwart the intent of Section 6409.

To address this issue and reduce procedural uncertainty, Crown Castle urges the Commission to clarify that the Section 6409 shot clock, like the Section 332 shot clock, applies to all authorizations necessary for an EFR under Section 6409.[11] Crown Castle further agrees with the Petitions that the Commission should clarify that a deemed granted notice authorizes an applicant to move forward with construction and deployment even if the local government refuses to issue building or other permits technically required under local regulations.[12] Additionally, the Commission should clarify that approval processes for EFRs: (1) must be designed or applied in a way that is reasonably related to a determination of coverage under the EFR rules; (2) must be non-discretionary; and (3) must be based on generally codified requirements that are reasonably related to health and safety.

B. Conditional Approvals Cause Procedural Uncertainty and Delays.

Another significant delay occurs where a state or local government approves an EFR but

[11] *See* Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, 30 FCC Rcd 9088 (2018) ("September Order").
[12] *See* WIA Declaratory Ruling Petition at 7.

adds unacceptable conditions that are not authorized under Section 6409. In this instance, it is unclear whether (1) an improperly conditioned approval is a "failure to approve or deny" under the Section 6409 rules such that a request is deemed granted;[13] (2) such conditions in an approval are preempted and void under Section 6409; or (3) a conditional approval gives rise to a judicial claim that must be filed within thirty days.[14] As a result, procedural ambiguity arises, which often results in lengthy discussions and negotiation for the removal or revision of the problematic conditions.

The types of conditions that are added to EFR approvals are varied. Frequently, these conditions are particularly problematic because they extend well beyond the scope of the modification that is subject to the EFR or the authority of the applicant to comply.[15] Examples of conditions include such items as additional landscaping, painting or other aesthetic requirements, access road maintenance or improvements, performance bonds for removal of entire tower sites, indemnification agreements[16] between landowner and jurisdiction or tower owner/operator and jurisdiction, and maintenance plans. Some conditions grant additional unrelated rights to a jurisdiction, such as a condition that an entire site may be relocated or entirely removed if the planning or zoning officer determines the site is no longer "needed." Other conditions extend beyond what an applicant is legally required to do under state or federal law, such as a jurisdiction in California that required additional RF barriers and inaccurate signage regarding RF to be

[13] *See* 47 CFR § 1.6100(c)(4).
[14] *See id*. at § 1.6100(c)(5).
[15] Another common occurrence is where a jurisdiction imposes conditions on a permit for an unrelated collocator on a site that impacts the larger compound or even the landowner's property beyond the wireless site. A subsequent EFR collocator may find themselves without legal authority to comply with the prior imposed conditions. A subsequent EFR application should not be delayed or denied as a result of these conditions.
[16] One jurisdiction in Pennsylvania, in violation of the 6409 Rules, refused to grant building permits to a collocating applicant until the tower owner brought a legal non-conforming site into compliance by issuing a removal bond for $100,000 and negotiating an indemnification agreement. The jurisdiction then charged the tower operator for its legal fees to negotiate the agreement.

placed on a site.

Accordingly, the Commission should clarify that any conditions added to the approval of an EFR that extend beyond generally applicable objective and codified health and safety codes violate the Congressional mandate that a state or local government "shall approve and may not deny" an EFR, and are, as a result, void and unenforceable. Additionally, to further assist with regulatory certainty, the Commission should clarify that health and safety conditions added to approval of an EFR must contain a reference to the codified source of the condition.[17]

C. The Substantial Change Definition of "Defeats Concealment Elements" Lacks Objective Criteria and Should be Clarified.

Under the 6409 Rules, the Commission found a modification constitutes a substantial change in physical dimensions under Section 6409 if the change would defeat the existing concealment elements of the tower or base station.[18] Although intended by the Commission to be an objective standard,[19] the "defeating concealment" element of substantial change is the most subjective of the substantial change criteria and is increasingly and broadly interpreted by many local governments to prohibit the use of Section 6409.[20]

Crown Castle has previously highlighted the fact that many local governments have taken

[17] This reference requirement should also apply during the application process – any time a state or local government invokes "health and safety" as the basis for an application requirement or condition, the inclusion of the code or ordinance from which the requirement is derived will assist in streamlining the process and reducing the amount of back-and-forth regarding applicability. The Commission should further clarify that any "health and safety" code or ordinance appropriate for conditioning an EFR should be a non-discretionary process whereby the condition is satisfied or approval provided once clear and objective criteria are met.

[18] 47 C.F.R. § 1.6100(b)(7)(v).

[19] *See* 2014 Order at ¶ 188 (adopting an "objective standard" for determining when a modification is a substantial change); ¶ 189 (concluding test should be defined by "specific, objective factors").

[20] There myriads of variations of governmental interpretations of "defeating concealment." Some common practices of jurisdictions include claiming that the following defeat concealment, even when not included in siting approval: increasing the height of a monopine; increasing the height of a light pole; failure to add screens to antenna; any change to branches on a stealth tree; addition of opaque fencing; enclosing of equipment within shelters; increasing the width of a canister on a flagpole or utility pole; and external cabling on a non-camouflaged monopole.

this statement beyond its logical limit by labeling certain elements of the original siting approval as concealment factors in order to deny an EFR.[21] Further, many jurisdictions deny an EFR or add conditions not contained in the siting approval in the name of "concealment." In many of these jurisdictions, once a modification is beyond the scope of Section 6409, the local government will require the site to be brought up to current design criteria for new towers under the local ordinance. Often, this requires a lengthy and expensive redesign and replacement of the entire site, in addition to an extended and discretionary review process.

In instances where there is a disagreement as to whether a modification "defeats concealment," the 6409 Rules provide little in the way of objective criteria or guidance to resolve the issue. When there are divergent perspectives between a local government and an applicant on whether a requested modification meets the "defeat concealment" criteria, an applicant is effectively precluded from utilizing Section 6409. As a result, an applicant must choose either to abandon its modification, leave its fate to the courts in litigation, or to follow the jurisdiction's often lengthy discretionary approval process. As the modifications are often necessary for coverage or to upgrade or replace equipment, the applicant has no option but to go through full zoning processes, which results in a long process with substantial additional costs.

Accordingly, Crown Castle agrees with WIA,[22] CTIA, and T-Mobile[23] that the Commission should provide further, more objective, guidance on the definition of what it means to "defeat the concealment elements" of an existing site. Specifically, the Commission should make clear that "concealment elements" are those elements purposefully added to the original

[21] *See* Crown Castle August 10, 2018, letter at 11-12.
[22] *See* WIA Declaratory Ruling Petition at 12-13.
[23] Letter from Cathleen A. Massey, Vice President, Federal Regulatory Affairs, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WT Docket No. 16-421 (filed August 30, 2019) at 3.

structure siting approval to make a wireless tower or base station appear as something different.[24]

Additionally, the Commission should clarify that not every change to a concealment element reaches the level of "defeating" the concealment. Legally, "defeat" means to "annul or render something void."[25] In every day usage, "defeat" means to "to cause someone or something to fail,"[26] or to nullify or destroy.[27] Accordingly, the Commission should clarify that to rise to the level of defeating a concealment element, a modification must entirely render the concealment void or useless.

D. Some Jurisdictions Broadly Interpret "Equipment Cabinet" to Include Tower Attachments.

The 6409 Rules provide that a modification substantially changes an existing structure for any eligible support structure if "it involves installation of more than the standard number of *new equipment cabinets* for the technology involved, but not to exceed four cabinets."[28] Despite the clear reference to "new" equipment cabinets and the plain language of the rule, some local governments interpret the rule to limit the maximum number of equipment cabinets on a site to four. To eliminate any confusion on this point, the Commission should clarify that the substantial change criteria with respect to cabinets is applied on a per-application basis and is not cumulative.

Additionally, the Commission should further define the term "equipment cabinet." There is no definition in the 6409 Rules. As a result, multiple jurisdictions have taken the unreasonable

[24] This is consistent with a federal court reasoning when faced with this issue. *Bd. of Cty. Commissioners for Douglas Cty., Colorado v. Crown Castle USA, Inc*., No. 17-CV-03171-DDD-NRN, 2019 WL 4257109 (D. Colo. Sept. 9, 2019) (holding that concealment elements as used in the 6409 Rules are specific objective conditions placed on a facility to make it blend or appear to be something other than a wireless transmission facility).
[25] Black's Law Dictionary at 450 (8th ed. 2004).
[26] Cambridge Dictionary, www.dictionary.cambridge.org/us/dictionary/English/defeat (last visited Oct. 29, 2019)
[27] Merriam-Webster, www.merriam-webster.com/dictionary/defeat (last visited Oct. 29, 2019).
[28] 47 CFR § 1.6100(b)(7)(iii) (emphasis added). The 6409 Rules add an additional criteria for towers in the public rights-of-way and base stations, providing that a modification is a substantial change as well if it "involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure."

position that certain small transmission equipment mounted on a tower, such as remote radio units, constitute "equipment cabinets." For example, Telecom Law Firm, PC, as consultant to a number of cities, has advised and caused these cities to count proposed small radio transceivers mounted behind antennas on a tower as "equipment cabinets" under Section 6409. As a direct result, multiple applicants have been forced into a discretionary conditional use permit process based on excessive equipment cabinets even when the scope of work does not actually include the addition of any actual equipment cabinets.

Accordingly, Crown Castle agrees with WIA that the Commission should clarify that any equipment attached to an existing tower, base station or small wireless facility node – regardless of how such equipment is packaged or manufactured -- does not constitute an equipment cabinet under the 6409 Rules.[29] Crown Castle has previously noted this issue in filings with the Commission.[30]

E. The Commission Should Clarify the "Siting Conditions" Element of Substantial Change.

Section 1.6100(b)(7)(vi) of the 6409 Rules provides that a modification substantially changes the physical dimensions of an existing structure if "it does not comply with conditions associated with the siting approval of the construction or modification" of the existing structure.[31] This criteria has been misinterpreted by local governments to mean that if *any* aspect of a site is out of compliance with the siting approval or if there is noncompliance with *any other permit* subsequently issued on site, that an EFR may not proceed.[32]

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[29] *See* WIA Petition at 13-14.
[30] *See* Crown Castle August 10, 2018 Ex Parte Letter at 12.
[31] 47 CFR § 6100(b)(7)(vi).
[32] This is used by local governments to enforce unrelated siting conditions as well as to bring legal non-conforming sites into compliance. This is an extremely common position that includes issues such as: landscaping; correction to subdivision plat for parent parcel where tower site is located; access roads being brought up to current code; irrigation pumps; fencing modifications; bringing equipment of other carriers into compliance with prior permits; lighting;

For example, some local governments – and in particular, some municipal consultants – will require the submission of a complete permitting history by the applicant, and then scour such permits to find discrepancies. The reviewing government will then use these discrepancies or issues, no matter how minor or unrelated to the EFR, to deny or delay an EFR. Some jurisdictions will discover an unmet siting condition in the course of an EFR review and refuse to issue a permit or proceed until such condition is remedied, such as previously installed landscaping that has since died. Still more may withhold approval or processing of one customer's EFR because a permit for a different customer has not been closed out, because fees remain outstanding, or because a different customer on the same tower site is out of compliance with a collocation permit.

The Commission should clarify that these matters are beyond the scope of Section 6409. It is important to note that a state or local government retains its local processes and remedies to address all such issues, and this clarification would not prevent localities from enforcing their codes and siting conditions."[33] Section 6409, however, does not provide a mechanism to withhold EFR approval based on unrelated permitting issues. Accordingly, Crown Castle agrees with WIA that the Commission should clarify that this "substantial change" criteria only applies if the proposed modification itself would cause non-compliance with prior conditions imposed on a structure or site.[34] Further, the Commission should expressly state that existing violations or concerns beyond the scope of the EFR may not be used as a basis to delay or deny an EFR.

As an additional point of clarification, the Commission should clarify that non-compliance with a condition of a siting approval or subsequent permit does not convert an "existing" tower under the 6409 Rules into a non-existing tower. The 6409 Rules define an "existing" tower or base

annual reports for tower; prior bonding requirements; payment of annual fees; drainage ditches; and renewal of maintenance contracts.

[33] WIA Declaratory Ruling Petition at 15.

[34] *See id.*

station as one that has been constructed and "has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed."[35] Some local governments take the position that an alleged discrepancy or inconsistency between *any* prior permit and a tower or base station as built render such structure as "non-existing" for purposes of Section 6409. Additionally, others take the position that an alleged existing violation of a prior permit or siting approval renders an application ineligible for consideration as an EFR. Although a tower or base station that did not go through proper review at time it was built is not considered "existing" under 6409 Rules,[36] there is nothing in the record to support the position that an inconsistency, discrepancy, or even an actual violation would render a tower or base station that was properly approved for such use a "non-existing" structure.

Again, Section 6409 does not and should not prevent local jurisdictions from addressing issues of noncompliance, permitting discrepancies or violations. But it does prevent the use of unrelated matters to delay EFRs. Issues identified during the EFR process may even be addressed concurrently on a parallel path as the EFR application, but unrelated issues should be treated as separate matters.

1. Jurisdictions Deny or Delay EFRs Based on Blight and Other Issues Outside of Tower and Base Station Sites.

For sites outside of the public right-of-way, at times a jurisdiction will refuse to allow an EFR to proceed until issues are remediated on the larger parent parcel of land upon which a tower or base station is located. Some governments will hold EFR permits as leverage until unrelated

[35] 47 CFR § 1.6100(b)(5).
[36] *See* 2014 Order at ¶ 174.

issues on a landowner's property are remedied. This sometimes arises in the context of blight – for example, a city in Michigan, in a widespread attempt to address blight issues, was previously withholding EFR permits on any property when the fee owner had any blight violations on any other property in the city. In other instances, where there has been neglect or violations on a parcel by the fee owner or another tenant or business on the property, the local government will not allow an EFR to proceed until remedied. For example, a county in California refused to allow an EFR application to be submitted because of an improperly permitted building located on the other side of the parcel. A city in Maryland refused to allow any permits to be obtained for EFRs because, entirely unrelated to the tower site, excavation and clearing activities had been conducted by a property owner without proper permits. A township in New Jersey denied an EFR because an unrelated business on another portion of the owner's property was in violation of its permitting approval and refused to proceed with the EFR until the non-tower site was brought into conformity.

There are ample state and local processes and procedures for local governments to address non-compliance and violations on property within its jurisdiction. Section 6409, however, is not intended to be an enforcement mechanism for unrelated issues, and its purpose should not be thwarted by such use. Accordingly, Crown Castle agrees with WIA that the Commission should clarify that unrelated blight or other violations on an owner's property may not impact or delay the processing of an EFR.[37]

2. Jurisdictions Deny or Delay EFRs on Legal Non-Conforming Sites.

The Commission previously found that legal non-conforming structures should be available for modification under Section 6409 as long as the modification itself does not substantially change the physical dimensions of the supporting structure.[38] Despite this clear

[37] WIA Declaratory Ruling Petition at 17.
[38] 2014 Order at ¶ 100.

guidance, many local governments continue to refuse to process EFRs on sites that are legal non-conforming sites or require a site to be brought into conformity as part of the EFR process.

The most common issue occurs where local governments attempt to enforce conformity with current codes or ordinances with respect to aesthetic requirements such as landscaping, fencing, flush-mounted antennas, canister or other enclosures for mounted antennas, and shelters or enclosures for ground equipment. The issue of legal non-conforming sites, however, arises in a large variety of contexts. For example, a town in New York required the applicant to obtain a variance for the entire site to comply with setbacks from government buildings. A town in Utah required an applicant to demonstrate a site could withstand increased wind speeds based on a proposed ordinance revision. Multiple jurisdictions where real property containing a tower site was annexed into the jurisdiction have required applicants to bring the site into conformity with the new jurisdiction's ordinance prior to or as part of the EFR process.

Crown Castle agrees with WIA that the Commission should clarify that non-compliance with new local requirements unrelated to a specific structure or site – including, but not limited to general requirements regarding landscaping, access roads, and fencing – have no bearing on whether a structure remains eligible for treatment under Section 6409.[39] Further, the Commission should reiterate and expand on its prior guidance that a state or local government cannot force an applicant to bring a legal non-conforming site into compliance with current code in connection with an EFR application or approval.

F. The Separation Clause in Section 1.6100(b)(7)(i) Creates Uncertainty When Calculating Height Increase Thresholds.

Crown Castle agrees with WIA that the language in the substantial change criteria for height regarding separation in Section 1.6100(b)(7)(i) should be clarified. The provision currently

[39] WIA Declaratory Ruling Petition at 19.

states that for towers outside of the right-of-way, a modification substantially changes the existing structure if it increases the height of the tower by "more than 10% or by the height of one additional antenna array *with separation from the nearest existing antenna not to exceed twenty feet*, whichever is greater."[40] Many localities read this criteria to mean that a substantial change is triggered by a height increase that is the greater of 10% or twenty feet, rather than the greater of 10% or the height of an antenna array plus separation (where separation distance is capped at 20 feet).

The Commission based its "substantial change" criteria on the "substantial increase" criteria from the 2001 Nationwide Programmatic Agreement for the Collocation of Wireless Antennas ("Collocation Agreement").[41] The substantial change criteria in the 6409 Rules for height mirrors the substantial increase criteria under the Collocation Agreement: "the height of one antenna array plus separation not to exceed twenty feet, whichever is greater."[42] It is clear from the Collocation Agreement's Fact Sheet that the definition was intended to allow for up to twenty feet of separation, regardless of the height of the antenna array.[43] The Commission should clarify that its intent for height increase criteria for Section 6409 is the same – to allow for sufficient separation between antenna array of up to 20 feet, regardless of the height of the antenna array.

[40] 47 CFR § 1.6100(b)(7)(i) (emphasis added).
[41] *See* 2014 Order at ¶ 190 (finding that "the objective test for 'substantial increase in size' under Collocation Agreement should inform factors for consideration of the factors to consider" for assessing substantial change, which "reflects [the Commission's] general determination that definitions in the Collocation Agreement and NPA should inform our interpretation of similar terms in Section 6409(a)").
[42] Collocation Agreement at 3, section I.C.1.
[43] Antenna Collocation Programmatic Agreement Fact Sheet, January 10, 2001, at 4. The Fact Sheet clarifies the substantial increase provision with an example: "Thus, a 150-foot tower may be increased in height by up to 15 feet without constituting a substantial increase in size. If there is already an antenna at the top of the tower, the tower height may be increased by up to 20 feet plus the height of a new antenna to be located at the top of the tower."

G. Setback Requirements Are Being Used to Deny Otherwise Covered Modifications.

A common situation that arises with respect to EFRs is where there is a height increase that is below the substantial change threshold of the 6409 Rules[44] but such increase results in the eligible support structure falling out of compliance with a setback requirement in a siting approval or local ordinance. In such instances, some local governments have denied EFRs or refused to allow an EFR to proceed as a result of noncompliance with setbacks.

To allow a setback to prevent approval of a modification that would otherwise qualify as an EFR defeats the purpose of substantial change criteria for height increases of section 1.6100(b)(7)(i). Additionally, denying an EFR based on a setback requirement in a siting approval defeats the purpose of substantial change criteria under Section 1.6100(b)(7)(vi). Section 1.6100(b)(7)(vi) states that its limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds set forth in section (i) through (iv), which includes the height increase threshold. As a result, a denial based on a setback condition is not captured under Section 1.6100(b)(7)(vi).

Crown Castle agrees, therefore, with WIA that the Commission should clarify that new fall zone and setback requirements cannot be used to deny an otherwise qualified application,[45] and that the Commission should state that new fall zone and setback requirements, while appropriate when approving new wireless support structures, may not be used to deny an application for an otherwise qualified EFR on existing infrastructure.[46]

[44] *See* 47 CFR § 1.6100(b)(7)(i).
[45] WIA Declaratory Ruling Petition at 19.
[46] *Id*. at 20.

H. Jurisdictions Are Limiting "Current Site" to the Originally Approved Lease Area.

The 6409 Rules provide that a modification is a substantial change if it "entails any excavation or deployment outside of the current site."[47] The 6409 Rules do not define "current site," but do define "site" as "[f]or towers other than towers in the public rights-of-way, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground."[48] Despite the repeated use of the term "current" in the defined term and definition, some local governments interpret "current site" to mean the compound or lease area at the time of the original siting approval for the tower.

This Commission should clarify that "current" means the leased or owned property at the time of submission of the EFR application. This clarification complements the proposed rulemaking urged by WIA and CTIA and supported by Crown Castle with regard to compound expansion.

I. Some Jurisdictions Deny EFRs Based on Number, Size, or Type of Antenna or Collocator.

Some jurisdictions include provisions in their ordinance or in the original siting approvals that limit the equipment that may be collocated on a tower. These limits may include a maximum number of antennas that may be installed on tower, or a maximum number of carriers or customers on a tower, as well as limits on the size or type of antennas. The substantial change criteria under the 6409 Rules does not allow for such limitations and they are preempted. Nevertheless, some local governments continue to impose such restrictions on EFRs. Accordingly, Crown Castle

[47] 47 CFR § 1.6100(b)(7)(iv).
[48] *Id*. at § 1.6100(b)(6).

agrees with WIA that the Commission should clarify that local restrictions imposed on the size or number of antennas that may be placed on a structure do not constitute "conditions" under Section 1.6100(b)(7)(vi), and that restrictions on antenna size, type, and placement cannot, standing alone, constitute a substantial change."[49]

III. Procedural Uncertainty Arising under the 6409 Rules Causes Delay and Confusion.

Recognizing the need to expedite the economical and efficient deployment of collocation on existing structures, the Commission went to great lengths to implement the Congressional mandate of Section 6409 by outlining the procedure for reviewing EFR applications in its 6409 Rules. However, there remains confusion and delay in the implementation of Section 6409 in many cases. This often arises from the lack of understanding of Section 6409 and the impact of the federal restrictions upon inconsistent local process. In other instances, this delay is a result of deliberate actions by local governments to circumvent federal control. Clarification of key points will provide clarity for applicants and jurisdictions alike as well as provide applicants support when challenging requirements imposed by local governments that are preempted by Section 6409.

The Commission previously found that state or local governments may require parties to file an application when asserting a modification is covered by Section 6409 and that such jurisdictions may review the applications to determine the applications constitute covered requests.[50] Consistent with the Congressional mandate that a state or local government "shall approve and may not deny" an EFR, the Commission limited the scope of documentation and information that may be provided to only that which is reasonably related to determining whether a request is covered by the Commission's rule, and limited the discretion of the state or local

[49] WIA Declaratory Ruling Petition at 16.
[50] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Fed. Reg. Vol. 80, No. 5, at ¶ 103 (January 8, 2015) ("2015 Final Rule").

government to a determination of whether a request is an EFR. Beyond this, a state or local government has been left free to impose the process of its choice upon an applicant seeking approval of an EFR. Although a few state and local governments have enacted processes that are consistent with the mandate of Section 6409 and the 6409 Rules, many others continue to impose lengthy, discretionary processes and requirements on EFR applications.

A. The Lack of Compliant or Complementary EFR Processes Cause Confusion.

Because the 6409 Rules do not create a specific application process, one of the biggest challenges that both applicants and local governments must work through is the interplay between the federal scheme and local processes and ordinances that were never intended to address the non-discretionary review mandated by Section 6409. Unless a state or local government creates an EFR process that is consistent with the 6409 Rules, applicants are often forced to wade through long checklists of inapplicable requirements to determine those that are relevant to the EFR, explain such inapplicability to local government staff, and negotiate a path forward. Likewise, local government staff who may process large volumes of different types of applications are forced to deviate from their established procedures on an EFR, resulting in confusion, delay and sometimes conflict with applicants that must be resolved before an EFR may move forward. A related problem occurs when a state or local government enacts an ordinance or process for EFR, but where such process is inconsistent with the 6409 Rules.

These current scenarios could be eliminated if there was consistency between the federal requirements and state and local processes. To this end, the Commission should consider proposing a uniform EFR application form, consistent with the intent of its rules for potential adoption and use by state and local governments. Further, the Commission should highlight the benefits of federally-compliant state and local processes and ordinances and encourage state and local

governments to consider enacting and utilizing EFR specific processes in their jurisdictions. This could eliminate a significant amount of delay and free up the resources of both applicants and local staff to focus on other matters.

B. Shot Clock Calculation Issues Cause Confusion.

At the heart of Section 6409 is the sixty-day shot clock. The expiration of this sixty-day review period absent proper government action triggers the remedy of an EFR being deemed granted. It is in the best interests of applicants and state and local governments that the calculation of this review period be as precise and unambiguous as possible. The application of the 6409 Rules over the past five years has exposed common ambiguities that arise in practice. The Commission should clarify the existing rule to eliminate points of ambiguity and eliminate unnecessary debate and delays.

1. Mandatory Pre-Application Processes Unnecessarily Delay EFRs.

Many jurisdictions employ pre-application requirements in their existing processes to assist with routing of requests, to advise applicants on processes or to attempt a more efficient process.[51] With respect to EFRs, however, pre-application processes are largely or entirely unnecessary given the limited scope of review available to a state or local government.[52] The Commission should expressly clarify that mandatory pre-application processes and meetings with respect to EFR are

[51]Jurisdictions all over the country employ a variety of practices with respect to pre-application requirements. For example, the City of Seattle, Washington requires a submittal with an actual appointment scheduled from two to four months later, and then an additional sixty to seventy-five days to obtain permits after that. A county in Texas will not determine whether an applicant may apply for a permit unless there has first been filed an address verification application and a flood plain determination. Whatcom County, Washington requires a pre-screen application before an intake appointment can be made, taking anywhere from one to thirty days to schedule. The Cities of El Cajon and Poway, California require pre-application appointments. Douglas County and El Paso County, Colorado utilize pre-application processes for EFRs. The City of Sonoma, California has codified its requirement for a mandatory pre-submittal conference specifically with respect to EFR under Section 6409.

[52]In practice, there is often little utility to the processes required. For example, a city in Virginia requires a pre-application process that an applicant submit initial plans along with a $510 check. Typically, there is no response until the applicant follows up on the request, and there appears to be no actual review until the application package, along with an additional $5,000 fee, is received.

preempted to the extent that they are inconsistent with Section 6409(a) and 6409 Rules.

Additionally, the Commission should provide guidance consistent with treatment of pre-application processes for its non-Section 6409 shot clocks.[53] Specifically, the Commission should clarify that (a) mandatory pre-application procedures and requirements do not toll the shot clock; (b) requiring a pre-application review before an application may be filed is similar to imposing a moratorium; and (c) if an applicant proffers an application, but a state or local government refuses to accept it until a pre-application review has been completed, the shot clock begins to run when the application is proffered.

2. The Commission Should Clarify that Any Reasonable Request Starts the Shot Clock.

There is some ambiguity currently contained within the 6409 Rules with respect to when the shot clock starts. The 6409 Rules provide that a state or local government must act within sixty days of "the date on which an applicant *submits a request*,"[54] but also provides that the sixty-day period "begins to run when *an application is filed*."[55] Reading these two provisions together, it is unclear whether any form of request is sufficient to start the review period, or if an actual application is required. Further, since jurisdictions have varying processes, it is not even always clear when an application is considered "filed" for purposes of starting the shot clock. For example, some jurisdictions utilize a process where an application is filed, after which the jurisdiction calculates the filing fee to be paid. In this event, some parties use the date of the filing of the application to start the shot clock, and others use the date that the fees are paid. In other instances, an applicant may make a request or attempt to file an EFR at the counter, which is rejected for some reason. In other instances, a pre-application process is required where an EFR request is

[53] September Order at ¶ 145.
[54] 47 C.F.R. § 1.6100(c)(2) (emphasis added).
[55] *Id*. at § 1.6100(c)(3) (emphasis added).

made but the government will not accept an actual application until later.

Crown Castle agrees with WIA that the Commission should clarify that the Section 6409 shot clock begins to run once an applicant in good faith attempts to seek the necessary local government approvals.[56] Where there is a specified federally-compliant process for submission of an EFR, a good faith effort would be following such process. Where, as in many jurisdictions, there is no defined process, the submission of a request under any reasonable available process would suffice to start the review period. In situations where there is a pre-application requirement or there is no clear process to follow, an initial written submission should be sufficient to start the review period.[57]

The Commission should clarify that when a state or local government does not have a federally compliant process for EFRs in written and published form, then any written request starts the shot clock. Further, the Commission should make clear that if a local government determines it wants a review by a different department or process after submission, it must transfer such request to that department and that any such approvals must be granted within the shot clock review period.

3. The Commission Should Clarify Issues Related to Tolling Calculations.

The 6409 Rules provide that to toll the timeframe for review, a state or local government must "*provide*" written notice within thirty days of receipt of the application.[58] The rule further states that the timeframe begins running again when the applicant "*makes*" a supplemental submission.[59] A state or local government then has ten days to "*notify*" the applicant that the

[56] *See* WIA Declaratory Ruling Petition at 8.
[57] *See id*. at p. 9.
[58] 47 C.F.R. § 1.6100(c)(3)(i).
[59] *Id.* at § 1.6100(c)(3)(ii).

supplemental submission did not provide the requested information.[60] Similarly, a deemed granted notice is effective when the applicant "*notifies*" the reviewing jurisdiction.[61] Under the 6409 Rules, it is not clear to the parties whether a shot clock is started, tolled or restarted when a notice or submission is sent or when it is received. The Commission could provide further certainty by clarifying these terms, in particular by specifying if the notices and submissions are effective when delivered or received.

4. The Commission Should Clarify That Tolling Only Occurs if the Code Section is Identified and Further Define the Phrase "Clearly and Specifically Delineating" as it Relates to Documentation Requests.

The Commission has previously stated that for Section 332 shot clocks, "in order to toll the timeframe for review on grounds of incompleteness, a municipality's request for additional information must specify the code provision, ordinance, application, instruction, or otherwise publicly-stated procedures that require the information to be submitted."[62] The Commission found that this would avoid delays due to uncertainly or disputes over what documents or information are required.[63] The Commission should clarify that the same standard applies to the Section 6409 shot clock.

Vague and overbroad responses cause delay as the applicant must finely review all plans and drawings to find the alleged inconsistencies or make further inquiries of the jurisdiction as to how the request relates to the EFR. The Commission should clarify that the term "clearly and specifically delineating" in the context of tolling requires the identification of specific sections or portions of reports where the reviewing government has concerns, and that if not readily apparent, the reviewing jurisdiction should provide information as to how the missing item is related to the

[60] *Id*. at § 1.6100(c)(3)(iii).
[61] 47 CFR § 1.6100(c)(4).
[62] 2015 Final Rule at ¶ 133.
[63] *Id*.

EFR determination.

C. Inconsistencies in the Rules Require Clarification of the Parameters of a Failure to Act and the Requirements for Proper Action by a State or Local Government.

The 6409 Rules provide that a state or local government has two options during the review timeframe when presented with an EFR: either approve the application or determine that the application is not covered by the 6409 Rules.[64] The 6409 Rules further provide that in the event the reviewing government "fails to approve or deny" an EFR during the timeframe for review, "the request shall be deemed granted."[65] The 6409 Rules conclude that applicants and reviewing authorities may bring claims related to Section 6409 to any court of competent jurisdiction.[66] These provisions leave some ambiguity in practice as to the rights of the parties and proper way to proceed when a state or local government takes action that is outside of these parameters.[67] The Commission should cure inconsistencies 6409 Rules to provide even greater certainty to reviewing governments and applicants.

1. The 6409 Rules' Reference to "Denial" Causes Confusion Because an EFR Cannot be Denied.

Congress has expressly prohibited a state or local government from denying an EFR.[68] A procedural ambiguity arises, however, because the 6409 Rules specifically reference a denial. The 6409 Rules provide that in "the event the reviewing State or local government fails to approve *or deny* a request seeking approval under this section," the request is deemed granted. The 6409 Rules

[64] 47 CFR § 1.6100(c)(2) ("Within 60 days of the date on which an applicant submits a request seeking approval under this section, the State or local government shall approve the application unless it determines that the application is not covered by this section.").
[65] *Id*. at § 1.6100(c)(4).
[66] *Id*. at § 1.6100(c)(5).
[67] Another frequent question arising in connection with EFRs is whether applicants are required to waive their rights by following local administrative appeal processes. The Commission should consider clarifying its position with respect to claims under Section 6409.
[68] 47 USC § 1455(a) (a state or local government "shall approve and may not deny" an EFR).

further provide a judicial remedy to applicants to challenge a jurisdiction's "denial" of an EFR.[69] As a result, it is not always clear to applicants how to proceed when a local jurisdiction purports to deny an EFR but fails to make a determination that the request is not covered by Section 6409 or the 6409 Rules. Does the shot clock continue to run or must a judicial action on a claim be brought?

Such an occurrence is not uncommon. For example, a borough in New Jersey denied an EFR, stating it was "an expansion of a non-conforming use." Another borough in New Jersey denied an EFR because it was a legal non-conforming tower and therefore "a use variance is required." Yet another municipality in New Jersey denied an EFR, simply stating that the proposed removal and installation of new equipment would require "use variance relief." Even though the applicant asserted in writing that the requests were EFRs, these denials made no reference to Section 6409 or the 6409 Rules in any manner.

The Commission should provide clarity to applicants by stating that the only denial allowed under Section 1.6100(c)(4) of the 6409 Rules is one based on whether the application is an EFR. The Commission should further clarify that a document issued by a state or local government that purports to "deny" an EFR for any other reason is preempted and void and does not impact the shot clock.

An additional point of ambiguity occurs when a reviewing jurisdiction issues notes or recommendations that make points regarding Section 6409, but the jurisdiction stops short of making a determination of non-coverage. For example, municipal consultants will often issue a "memorandum" to the reviewing jurisdiction which is filled with "recommendations" as to how the reviewing authority could respond. The reviewing authority then forwards the memorandum

[69] 47 CFR § 1.6100(c)(4); 2014 Infrastructure Rule at ¶ 125.

to the applicant, leaving the applicant unsure of what position the reviewing authority is taking. In other jurisdictions, the government itself may issue review "notes" that make suggestions or recommendations relating to Section 6409 issues, but do not clearly make a determination of coverage. [70]

To eliminate these significant procedural ambiguities, Crown Castle urges the Commission to clarify that a "denial" of an EFR is actually a determination of noncoverage. Further, such determination must be (i) in writing; (ii) include a clear and specific express determination that the request is not covered by Section 6409; and (iii) include a clear statement of the grounds for the determination.[71] To further reduce ambiguity, the Commission should clarify that absent these conditions being met, the shot clock continues to run,[72] and additionally, that any other purported denial is void and of no effect as to Section 6409 and the 6409 Rules.

2. The Commission Should Clarify What May Be Required in an EFR Application Under Section 6409.

a. EFRs are Often Held Up Because of Unnecessary Requests Related to a Landlord or Landowner.

Because of the unique industry practices for wireless infrastructure, there are often multiple parties who may hold rights to the property where a wireless facility is located. Outside of the public right-of-way, often a tower or base station is located on a small portion of leased property. In the lease, the fee owner has often granted express rights to the tower owner to seek and obtain government approvals for the construction and modification of the tower or base station. This often includes designating the tenant as an agent or attorney in fact to obtain such approvals. Often, a

[70] This issue has arisen in litigation. In *Bd. of Cty. Commissioners for Douglas Cty., Colorado v. Crown Castle USA, Inc.*, No. 17-CV-03171-DDD-NRN, 2019 WL 4257109 (D. Colo. Sept. 9, 2019), one issue before the court was whether locality's "Presubmittal Review" triggered an obligation to bring a judicial action by the applicant.
[71] *See* WIA Declaratory Ruling Petition at 7.
[72] *See id*.

fee owner or landlord has contracted away their right to approve or object to any modifications to a tower and has no right to seek government permits or approvals for such modifications.

Despite this lease structure, many jurisdictions still impose strict requirements that a fee owner personally execute a letter of authorization ("LOA") for every EFR. Even where a recorded real estate document grants a tower owner or operator the right to obtain government approvals for permitting for a wireless site, some local governments still require an LOA before the application may move forward. Further, many local governments refuse to accept an LOA executed using a valid and recorded power of attorney, instead requiring the signature of the individual fee owner. Finally, many local governments will review LOAs with a fine-tooth comb, rejecting LOAs for even minor typos or scrivener's errors, inconsistencies or procedural issues such as requiring wet signatures or notarized copies. These requirements are not typically part of a codified ordinance or published practice and do not appear to be imposed on other types of applications.

Such fee owner authorization requirements are not reasonably related to determining whether a request is covered by Section 6409. Nevertheless, as it is unclear how a court would interpret the 6409 Rules with respect to such requirements and the 6409 Rules provide no certainty as to such requirements with respect to an EFR, applicants often attempt to comply with governmental requests with respect to LOAs. This not only delays the processing of EFRs but is often frustrating to tower owners/operators and landowners alike, who have specifically negotiated contract consent and approval rights to avoid the very practice of having to seek execution of LOAs or application signatures for every minor modification on a site.

Accordingly, the Commission should clarify that a state or local government may not delay or deny an EFR where an applicant has reasonably demonstrated authority to modify an existing

structure.

b. Examples of Information and Documents That Are "Reasonably Related" to the Determination of a Covered Request Would Provide Clarity to EFRs.

The 6409 Rules are clear that only documents and information reasonably related to a determination of whether a request is covered by 6409 Rules may be required during the application process. Further, the 6409 Rules impose the same standard on documents and information requested by the state or local government that toll the shot clock. Despite this clear guidance, local jurisdictions continue to force EFRs into inappropriate processes and require a multitude of documents and information that are not reasonably related to determining whether a modification is an EFR. This practice is resource-intensive for both applicants and government staff as they attempt to work through what documents are necessary. Additionally, when a local government requests additional information that is unrelated to the EFR determination as part of its notice of incompleteness, this puts the parties in the position of having to further determine whether tolling has actually occurred.

The Commission is able to provide additional regulatory certainty to the EFR process by providing further guidance on what is "reasonably related" to the EFR determination and providing concrete examples upon which applicants can rely in responding to preempted requests during the application process. The following are common examples of requests and requirements that are not reasonably related to the EFR determination but are routinely required:

- Propagation maps
- Full title reports for the underlying real estate
- Affidavits, bonds, and letters of credit for entire tower or base station site
- Photo simulations and 3D photo simulations (on non-camouflaged sites)
- Photometric plans
- Maintenance agreements
- Proof of notice to adjacent residents
- Compound inventories of all equipment, including other customer/carrier names

- Interference letters
- Landscape plans
- RF Reports
- Irrigation plans

Crown Castle supports and agrees with WIA that the Commission should issue a declaratory ruling reiterating that all documentation requests and process requirements from localities must be reasonably related to determining whether a request is covered under Section 6409, and that specific guidance or examples on commonly requested items that are not generally related to determination of a covered request would provide clarity to all parties.[73]

IV. The FCC Should Further Streamline Infrastructure Deployment by Taking a Targeted Step to Amend its Section 6409 Rules.

In addition to providing these important points of clarity on the 6409 Rules, there are two additions to the 6409 Rules that the Commission should implement. First, the Commission should expand the current definition of "site" to allow applications that include compound expansion to be reviewed as EFRs. Second, the Commission should clarify that fees to collocate on existing towers and base stations must be cost-based and reasonable. These two simple but significant changes will provide meaningful and common-sense additions to the Commission's efforts to streamline wireless deployment.

A. Allowing an EFR to Include a Limited Site Expansion Will Further Streamline Deployment.

As currently written, the 6409 Rules provide that a modification to an existing tower or base station is a "substantial change" if that modification includes excavation or deployment outside of the "current site."[74] In its 2014 rulemaking proceeding on Section 6409, the Commission considered and declined to adopt a compound expansion component to the 6409 Rules. However,

[73] WIA Declaratory Ruling Petition at 24.
[74] 47 CFR § 1.6100(b)(7)(iv).

the development of the needs of wireless networks as well as legal trends now compel reconsideration of this issue. Crown Castle agrees with WIA that the Commission should amend its rules to make clear that a substantial change under Section 6409 occurs with respect to compound expansion only if excavation would be undertaken more than 30 feet from a tower or base station site boundary.

1. Existing Sites Often Are Not Well-Suited to Meet Current Network Needs.

As noted by WIA, most existing towers were built long ago with the intention of supporting only the operations of a single carrier.[75] The need to expand the ground space used as part of an equipment compound is common in the wireless infrastructure industry. In the past eighteen months, wireless carrier activity has required additional compound space at hundreds of Crown Castle sites. It is important that the Commission recognize that the fundamental transition in wireless technology is occurring across all forms of wireless infrastructure. Often, existing equipment compounds were not designed to accommodate additional carriers or new technologies. In order to realize the full benefit of encouraging collocation (the fundamental, underlying policy of Section 6409), the Commission should reconsider its 6409 Rules to allow for minor compound expansion.

In addition to encouraging collocation, providing expedited review of minor compound expansions will provide a significant benefit to network resiliency efforts. In fact, much of the compound expansion activity results from a wireless carrier's need for a backup generator. This revision to the 6409 Rules will encourage more efforts to further harden networks. It is important to note that back-up generators will still be subject to a local government's existing, codified health and safety provisions. As a result, WIA's proposed compound expansions revision will not pose

[75] WIA Petition for Rulemaking at 7.

any greater risk for concerns such as environmental or electrical safety standards.

Additionally, as our nation continues its race to 5G, this Commission should recognize that new technology and new equipment will need to be installed and overlap with the current technology and equipment. Put another way, before old equipment can be replaced and removed, there must be space to install the new equipment. For everything from the overlap of 4G and 5G technology and equipment to the ability to utilize edge computing, WIA's proposed rulemaking on compound expansion will provide the regulatory certainty and predictability to continue the work of this Commission.

2. State Laws Already Recognize Compound Expansion as an Insubstantial Modification.

In addition to the developing needs of wireless networks, several states have passed laws to exempt minor compound expansion from local zoning and permitting requirements. Much like the 6409 Rules, these state laws address the zoning and permitting requirements for modifications to existing towers. After considering the policy implications and benefits, these states have passed legislation to permit compound expansion without further local review.

A survey of state law indicates that eight states have passed laws that expressly permit compound expansion within certain limits.[76] Conceptually, these state laws all permit compound

[76] These states are Florida (Fla. Stat. Ann. § 365.172(13)) (collocation that increase the ground space area (compound) approved in the original site plan by no more than a cumulative amount of 400 sq. ft. or 50% of the original compound size shall require no more than administrative review . . . with no public hearing); Indiana (Ind. Code § 8.1-32.2) (modification is a substantial change is increases the compound by more than 2,500 square feet); Michigan (Mich. Comp. Laws Ann. § 125.3514) (not subject to special land use approval if proposed collocation will not "increase the area of the existing equipment compound to greater than 2,500 square feet"); Missouri (Mo. Ann. Stat. § 67.5092) (modification is substantial if it "increases the square footage of the existing equipment compound by more than one thousand two hundred fifty square feet [1,250]"); New Jersey (N.J. Stat. Ann. § 40.55D-46.2) (collocation is exempt from site plan review if it does not increase the existing compound to an area greater than 2,500 square feet); North Carolina (N.C. Gen. Stat. § 160D-9-31(19(c)) (A substantial change is presumed if it is "increasing the square footage of the existing compound by more than 2,500 square feet"); Virginia (Va. Code Ann. § 15.2-2316.4:3) (no zoning required for replacement of "wireless facilities or wireless support structures within a six-foot perimeter with wireless facilities or wireless support structures that are substantially similar or the same size or smaller"); and Wisconsin (Wis. Stat. Ann. § 66.0404)(A modification is a "substantial modification" if it "increases the square footage of an existing

expansion under an exempt or expedited review process. In substance, the state laws take slightly varying forms and degrees of expansion. For example, laws in Indiana, Michigan, New Jersey, North Carolina and Wisconsin all provide that modifications which increase the size of a compound by 2,500 square feet or less are not a "substantial change." Other states provide for slightly different amounts of expansion (i.e., Florida, Missouri, Virginia). [77] Yet, within their respective thresholds, each of these state laws permits an expansion of a wireless facility compound without implicating a lengthy land use review process.[78]

Rather than an autocratic dictate, these state laws are a benefit to both the wireless industry and local officials. They permit the wireless industry to meet the burgeoning network demands while also providing certainty and clarity to all involved. The benefits of these state law measures working together with the 6409 Rules are seen in the City of Indianapolis, Indiana. There, Crown Castle routinely submits and works with local officials on wireless projects in the City, including projects that require additional space to an existing compound. Crown Castle and local officials work together to harmonize the 6409 Rules, Indiana state law, and the need to ensure the project is completed safely. Because the Indiana state law complements the 6409 Rules, collocation is encouraged, including in situations where additional compound space is needed. This collaboration allows Crown Castle and its customers to continue the important work of building out wireless networks and the local city officials to meet the needs of the city, including reasonable safety measures, while partnering in this effort. In short, regulatory certainty fosters cooperation and leads to efficient deployment.

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compound to a total area of more than 2,500 square feet").

[77] It is worth noting that still other states have expressly adopted the standards of the 6409 Rules into their state laws. These states are Iowa (Iowa Code Ann. § 8C.1); Kansas (Kan. Stat. Ann. § 66-2019); and Pennsylvania (53 P.S. § 11702.4).

[78] *See, e.g.*, N.J. Stat. Ann. § 40:55D-46.2(a) (Exemption from site plan review for collocation of wireless equipment; definitions).

3. The Commission Should Reconsider its Decision for Not Including Site Expansion.

These state laws coexist and complement the 6409 Rules. They are instructive in how to provide objective standards for compound expansion in a way that harmonizes the interests of both the wireless industry and the local governments. These laws however, stop short of providing a nationwide regulatory environment. A nationwide environment of regulatory certainty which encourages streamlined deployment on existing infrastructure is the very heart of both the Congressional intent in passing Section 6409 and this Commission's rules implementing the Congressional mandate. A patchwork of varying state laws, while helpful, will inevitably fall short of the Congressional vision for Section 6409.

Wireless networks do not stop at state borders. In order to foster the deployment necessary to meet our country's growing demand and the challenges of the 5G buildout, this Commission should act to amend its 6409 Rules to allow for compound expansion of up to thirty feet. Doing so will further encourage collocation, meet critical network resiliency needs and foster the development of new and emerging technology.

By taking the targeted step urged by the WIA Petition, this Commission could greatly streamline next generation deployment and harmonize federal and state laws. In short, it will create regulatory certainty.

B. Excessive Fees for Collocation Hinder Deployment of Broadband Infrastructure and Are Contrary to the Intent of Section 6409.

In addition, this Commission can greatly facilitate wireless deployment by specifying that collocation fees must be cost-based and reasonable. Despite the clear Congressional mandate of Section 6409, the Commission has not provided any guidance on collocation fees in its 6409 Rules.

The silence of the Commission on fees for collocation and minor modifications under Section 6409 stands in stark contrast to the Commission's clear guidance for fees under Section 253 and 332(c)(7) in the September Order. As collocation and network upgrade activity continues to increase for both macro and small wireless facility sites, the lack of restriction on fees for EFRs risks increasingly unfettered imposition of disproportionate and unreasonable fees on such activity. This will result in continued costly and time-consuming litigation over fees, the allocation of a disproportionate amount of resources to deploying otherwise minor modifications at the expense of deployment and growth in other needed areas, or the abandonment or restriction of deployment in costly jurisdictions.

Crown Castle routinely encounters jurisdictions with substantial application and review fees for modifications that would be considered minor by almost any objective standard. Fees paid to a local government for an EFR can range from less than $30 for a building permit application fee to more than $10,000 for aggregate various application and review fees in connection with a single modification to an existing site.

Often these fees include an escrow fee or deposit, frequently paid to a consultant retained by the jurisdiction to review applications for EFRs. Even though an EFR is, by definition, for approval of a modification of equipment on existing towers and base stations and the scope of review limited, some consultants require a substantial "escrow fee" from which they draw to cover their fees. As a result of this arrangement, certain consultants have no reason to promptly or comprehensively review an EFR application. Costs and fees drawn from these escrow fees are often far beyond the scope of review or necessity for an EFR. For example, as a general matter, EFR applications for collocation and equipment on existing infrastructure should not require multiple site visits by a consultant, which necessarily includes travel related expenses, but Crown

Castle encounters just these situations often.

The rationale for providing guidance on fees set forth by the Commission in the September Order is equally applicable to collocation fees. This Commission is familiar with the connection between jurisdictional fees and the impact on wireless deployment. The September Order extensively reviewed the record and found that exorbitant fees lead to reduced deployment in those jurisdictions and also reduce the capital available for deployment in other locations. "In both of those scenarios the bottom-line outcome on the national development of 5G networks is the same – diminished deployment of Small Wireless Facilities critical for wireless service and building out 5G networks."[79] This reasoning applies with equal or greater force to the cost of collocation applications. In fact, Crown Castle submits that placing parameters on EFR fees is particularly appropriate for two reasons.

First, the very nature of an EFR means that, by definition, a jurisdiction is not reviewing and approving the construction and installation of a new support structure. EFRs apply only to the collocation, replacement or removal of transmission equipment, including back up power supplies. As previously noted, many jurisdictions do not have a specific EFR ordinance or process and require EFRs to be submitted under existing processes that are designed for new structures, along with application and review fees that were enacted for new structures. As a result, the fees imposed on applicants for collocations and minor modifications are disproportionate to the time and resources that should be required of a local jurisdiction to review the EFRs.

It is important to note that the existing tower or base station has, by definition, already been reviewed and approved, in most cases by the same jurisdiction reviewing the EFR.[80] The review

[79] September Order at ¶ 66.
[80] *See* 47 CFR § 1.6100(b)(5) (stating that a constructed tower or base station is existing if it has been reviewed and approved under applicable regulatory processes).

of a minor modification or collocation on the same site should not require the same level of scrutiny or review as the original structure or a new structure, just as adding a deck to an existing house, while requiring some review, should not require the same level of review or cost as the construction of an entirely new house. An EFR should not become a revenue generating event for a local government. Imposing a cost-based and reasonable standard on EFR review is consistent with the nature of the modification and supported by the significant public policy need to eliminate unnecessary barriers to deployment.

Second, extensive review fees assessed by a jurisdiction or consultant for reviewing an EFR are counterintuitive given the limited and non-discretionary review mandated by Section 6409. As the Commission's rules make clear, the Congressional mandate of Section 6409 removes EFR applications from any discretionary review process. Upon receipt of an EFR application, Congress has left one job for state and local jurisdictions: make a determination as to whether the application is an EFR that does not substantially change the physical dimensions of the support structure. As a result, it is entirely appropriate and consistent with the Congressional intent of facilitating wireless deployment to require that EFR fees for such limited review be similarly limited. For consistency with the Commission's guidance and to provide greater regulatory certainty, a cost-based and reasonable standard is logical.

Again, on this issue, several state laws are instructive. Many states have passed laws limiting the fees that can be charged for these applications.[81] Some state laws provide a specific

[81] These states are Florida (Fla. Stat. § 365.172(13)) (fees must be reasonable and similar to other permit review fees and consultant fees must be limited to "specifically identified reasonable expenses incurred in the review"); Georgia (Ga. Code. Ann. § 36-66B-1) ($500 limit for collocation or modification); Iowa (Iowa Code Ann. § 8C.1) (total charges and fees capped at $500 for an EFR); Kansas (Kan. Stat. Ann. § 66-2019) ($500 for an EFR); Michigan (Mich. Comp. Laws Ann. § 125.3514) (fees not to exceed "actual, reasonable costs to review and process the application or $1,000, whichever is less."); Missouri (Mo. Ann. Stat. § 67.5092) (total charges and fees not to exceed $500 for a collocation application); New Hampshire (N.H. Rev. Stat. Ann. § 12-K:11) (fees must be non-discriminatory – similar to fees for other commercial development, and all fees, including third party review must be based on "actual, direct,

monetary cap on the application fees and still others require that fees for collocation applications be limited to "actual, direct and reasonable administrative costs" born by the jurisdiction in reviewing the application. In either situation, these state laws provide regulatory certainty and allow for the efficient use of capital and resources in building out a wireless network.

For these reasons, Crown Castle supports WIA's request that the Commission amend its rules to require expressly that fees for processing EFRs for the provision of telecommunication service must represent a reasonable approximation of actual and direct costs incurred by the government and that failure to pay disputed fees is not a valid basis for refusing to process (or to deny) an EFR. Further, Crown Castle requests that the Commission further expressly state that fees incurred by a jurisdiction or its agents must be reasonably related to the limited review that is mandated by Section 6409 and that costs and fees beyond such review are preempted.

V. Commission Clarification on Issues Related to Section 224 is Necessary to Ensure Non-Discriminatory Access to Utility Poles and Expedite the Deployment of Next-Generation Services.

In furtherance of its goals of streamlining wireline and wireless broadband deployment, the Commission should leverage its authority to clarify certain matters related to Section 224 to remove barriers to deployment and promote a level playing field for utilities and third-party attachers.

A. Utilities Must Provide Access to Light Poles for Third-Party Attachments Pursuant to 47 U.S.C. § 224.

The Commission should ensure timely and nondiscriminatory access to utility light poles pursuant to Section 224. The network densification needed to ensure the capacity vital to next

reasonable administrative costs" and may not include third party travel expenses); North Carolina (N.C. Gen. Stat. § 160D-9-34(d)) ("actual, direct and reasonable administrative costs incurred" and technical consult and review not to exceed $1,000.); Pennsylvania (53 P.S. § 11702.1) (limited to "actual, reasonable costs to review and process the application, or $1,000, whichever is less"); Virginia (Va. Code Ann. § 15.2-2316.3) (collocation fees not to exceed $500, all others not to exceed "actual, direct costs"); and Wisconsin (Wis. Stat. Ann. § 66.0404) (the lesser of $500 or the amount charged for other similar types of permits).

generation technologies demands that the Commission clarify that access to utility infrastructure granted under Section 224 applies equally to utility light poles as to any other utility poles. Today, although some utilities make their light poles available for wireline and wireless attachments, others only make light poles available if the streetlight is attached to a wooden electric distribution pole. Still others provide no access to any poles with streetlights attached. In the majority of instances where standalone streetlights are made available for communications attachments, availability is conditioned upon fees and terms that significantly exceed the regulated rate and may undermine the feasibility of using these poles for telecommunications attachments.

Utility light poles are located in the same locations in the public right-of-way where small wireless facilities must be installed. This makes the light poles excellent candidates for location and attachment of telecommunications facilities. Moreover, because this category of poles has facilitated limited telecommunications attachment to date, it is in many instances an ideal candidate for small wireless facility attachments. Indeed, where wireless attachments to utility-owned street light poles are permitted, Crown Castle has worked with utilities to develop shrouds that attach to the existing light poles and in some cases has even created replicas of the existing light poles that can accommodate radio and antenna attachments and blend in with existing infrastructure. When attaching small wireless facilities to wooden poles with street lights, these attachments can be made in the same manner as small wireless facilities that are installed on other wooden distribution poles, following NESC and/or the local utility's safety attachment guidelines.

In mandating access, Section 224 makes no distinction between utility poles and utility-owned light poles:

(f) Nondiscriminatory access

> (1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to *any* pole, duct, conduit, or right-of-way owned or controlled by it.
>
> (2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.[82]

The term "any" as used before "pole, duct, conduit, or right-of-way" is all encompassing.[83] Here, the sole limitation on "any" appears in Section 224(f)(2), under which a utility providing electric service may deny access only based on insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes. Denials of access to utility-owned or utility-controlled poles, ducts, conduit, or rights-of-way for any other reason not enumerated in Section 224(f)(2) are impermissible.

The word "pole" is not defined by Section 224 or in FCC regulations. In *Southern Company v. FCC*, the Eleventh Circuit rejected the FCC's holding that electrical transmission towers are presumptively subject to the mandatory access requirements of Section 224(f).[84] The Court's conclusion, however, was based on the fact that transmission towers are interstate in nature rather than local. The Court further concluded that poles subject to Section 224 are "components of local distribution systems and not interstate transmission systems."[85] Indeed the Court clarified and agreed with the FCC that "the Act generally covers ***all*** 'poles, ducts, conduits and rights-of-way' . . . ."[86] The focus of the Court's analysis was the local versus interstate nature of the facilities at

[82] 47 U.S.C. § 224(f).
[83] *See Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002) (citing *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1337 (11th Cir. 1999) ("[r]ead naturally, the word 'any' has an expansive meaning.... [when] Congress [does] not add any language limiting the breadth of that word, ... 'any' means 'all.'").
[84] *Id*. at 1344.
[85] *Id*.
[86] *Id*. at 1345 (emphasis added).

issue.

While utility-owned light poles may not be accounted for by utilities in the same accounts as their other utility-owned poles, these poles are nonetheless local in nature. Under FERC regulations, streetlights are categorized within the "distribution facilities" accounts, rather than with "transmission facilities." Moreover, utility-owned light poles are clearly "any poles" under the plain language of Section 224(f). Under the Court's analysis in *Southern Company*, streetlight poles are local distribution facilities subject to the mandatory access obligations of Section 224(f) and the Commission should clarify this issue in a Declaratory Ruling.

B. The Commission Should Reaffirm That Utilities May Not Impose Unreasonable or Unsupported Prohibitions or Restrictions on Access to Any Portions of the Poles They Own.

CTIA asks the Commission to clarify that utilities may not impose blanket prohibitions on access to their utility poles. Crown Castle supports this request. In its 2011 Pole Attachment Order, the Commission recognized that denying access to poles, ducts, conduits, or rights-of-way on the basis of "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes" was "susceptible to abuse" and sought to clarify a utility's obligation when denying an attachment request.[87] Specifically, the Commission stated:

> It is not sufficient for a utility to dismiss a request with a written description of its blanket concerns about a type of attachment or technology, or a generalized citation to section 224. Instead, we find that a utility must explain in writing its precise concerns--and how they relate to lack of capacity, safety, reliability, or engineering purposes--in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue. Furthermore, such concerns must be reasonable in nature in order to be considered nondiscriminatory. Concerns that appear to be mere pretexts rather than legitimate reasons for denying statutory rights to access will be given serious scrutiny by the Commission, including in any complaint proceeding arising out of a denial of access. We believe that this clarification regarding the specificity of denials will encourage communication and cooperation

[87] *In the Matter of Implementation of Section 224 of the Act: A Nat'l Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 ¶ 76 (2011).

> between utilities and wireless attachers, and thereby promote the deployment of and competition for telecommunications and broadband services.[88]

The Commission explicitly reaffirmed this position in the 2018 OTMR Order.[89] In spite of the Commission's directive set forth in the above language, Crown Castle frequently encounters unreasonable, blanket restrictions or prohibitions on the attachment of equipment or antennas in various sectors of poles. These restrictions are generally presented to communications attachers in one of three forms: (1) they are included in pole attachment agreements; (2) they are included in utility construction standards; or (3) they are not expressly stated in either the agreement or standards but are enforced by the utility, resulting in *de facto* restrictions. Regardless of where these blanket restrictions are found or enforced, they are unreasonable if they are not supported by specific proof regarding either lack of capacity, safety, reliability, or generally applicable engineering principles that may otherwise restrict a particular attachment and pole at issue.

Although Crown Castle encounters express blanket attachment prohibitions less frequently than other prohibitions, it is still common for utilities to broadly allege safety and climbing concerns as rationale for blanket prohibitions of any equipment attached in the unusable space on utility poles. Notably this space on the pole is essential for installation of small wireless facility radios, electric meters, and shutoff switches necessary for the deployment of small wireless facilities. In those instances where utilities prohibit such installations, Crown Castle is required to either place a new pole or add a pedestal or ground-mounted shroud in the right-of-way to hold such essential equipment. However, local jurisdictions are frequently loath to approve the

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[88] *Id.*

[89] *See In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, FCC 18-111 ("OTMR Order"), fn 498 (". . . we take this opportunity to reaffirm our comments in the 2011 Pole Attachment Order that: (1) a utility must explain in writing its precise concerns—and how they relate to lack of capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue; and (2) such concerns must be reasonable in nature in order to be considered nondiscriminatory. We expect attachers and utilities to work together to find code-compliant solutions that address any concerns raised by a utility.")

additional infrastructure, preferring instead that our attachments be collocated on existing utility poles. Thus, the utility's blanket policy conflicts with local requirements or preferences.

Indeed, contrary to the blanket bans by some utilities, nearly two-thirds of the utilities to which Crown Castle attaches its facilities permit the attachment of some equipment in the unusable space of a pole. This widespread deployment practice demonstrates the operational capabilities and safety of such attachments, undermining any blanket safety or climbing concerns voiced by investor-owned utilities for attachments in the unusable space on a pole.

In some instances, utilities only allow attachment of equipment in the unusable space if the local government prohibits installation of the equipment on the ground in the right-of-way. For instance, with certain utilities, Crown Castle has to demonstrate that an operative municipal ordinance or design standard does not permit ground-mounted telecommunications equipment in order to be able to place its equipment in the unusable space on the utility's poles. While Crown Castle appreciates that this alternative is available, such policies are clearly not based on legitimate safety or engineering bases. The prohibition of ground-mounted equipment in the right-of-way has no relationship with the safety of these attachments in the unusable space on any given utility pole. Consequently, safety concerns cited by utilities in support of such policies appear unreasonable and unsupported on their face.

Crown Castle also commonly encounters restrictions by utilities on the placement of meters for power consumption on utility poles. Most often, meters are placed in the unusable space of the pole to make them accessible and readable. For reasons that have never been fully clear to Crown Castle, some utilities prohibit the placement of their own meters on their poles, forcing attachers to place a meter pedestal in the public right-of-way or utilize unmetered service (when available). As noted above, local jurisdictions are reticent to grant permits for the placement of meter pedestals

in the right-of-way, particularly when the equipment being metered is attached to the utility pole and the utility is providing the power for the installation. Clarification that restrictions of this nature are unreasonable and unsupported by the appropriate criteria would eliminate further congestion in the right-of-way and speed deployment timelines. For those utilities that restrict meter attachments to their poles but offer an "unmetered" - or blanket purchase - option for power to small wireless facilities, the attaching telecommunications carrier is often forced to purchase more than double what it would otherwise be required to purchase under the metered rate. This scenario could be avoided by the placement of a small meter on the utility pole.

Many utility pole attachment agreements or standards contain restrictions on the number of antennas that may be attached to a pole, or the location where antennas may be placed. Most often, if the number of antennas is limited, it is limited to one antenna attachment. With the advent of 5G, for which attachment configurations commonly involve the attachment of multiple integrated antenna and radio units on a pole, these limitations stifle the deployment of next generation technologies and have no reasonable safety rationale. When asked to remove such restrictions in the context of agreement negotiations, including requests to strike such restrictions in construction standards, or in wireless attachment configuration reviews, utilities often cite radio frequency concerns as the main reason for refusing. However, the inclusion of construction standards or agreement provisions beyond those adopted by the FCC compromise access to the pole. The Commission is the appropriate authority regarding RF regulations on the deployment of wireless equipment on utility poles. The Commission should clarify this point and emphasize that attempts by utilities to impose their own restrictions or regulations on RF emissions amount to unreasonable barriers to access.

Attempts to restrict or prohibit the attachment of wireless antennas in certain zones of a

pole likewise function as unlawful denials of access. Many utilities have incorporated restrictions in their pole attachment agreements and construction standards that restrict the placement of antennas to one location or zone on a pole. For instance, a number of utilities limit antenna attachment points to the pole top. Others strictly allow antennas to be deployed only in the communications space. Still others prohibit the attachment of antennas in the communications space. Restrictions or prohibitions such as any of those cited immediately above amount to unlawful restrictions on access. The applicable factors for determining whether an antenna can be attached are whether RF regulations are followed, and applicable safety factors are maintained. Utilities may not substitute their judgment on RF emissions for that of the appropriate regulatory body. Indeed, the fact that antennas are permitted at the top of the pole and in the communications space demonstrates that any blanket prohibition on attachments either at the pole top or in the communications space are not based on safety or generally applicable engineering standards. They reflect policy decisions or biases by particular pole owners, which is not grounds for denying access under Section 224(f).

Additionally, several utilities impose blanket prohibitions against pole-top antennas on poles supporting primary distribution lines, even though such attachments are permitted under the NESC with proper clearances. Some utilities also prohibit ground-mounted equipment within a radius ranging from two to twelve feet from the pole, allegedly for safety and accessibility reasons.

Taken together, the net cumulative effect of these various restrictions can result in a *de facto* prohibition on wireless attachments in some areas. For instance, if a single pole-owning utility: (1) prohibits antennas on primary poles, so that secondary poles and light poles must be used; (2) prohibits the use of streetlight poles, so that secondary power poles must be used; (3) prohibits equipment and/or meters in the unusable space on secondary poles, so that ground-

mounted equipment is required; and (4) prohibits ground-mounted equipment within a certain radius of the pole, eliminating all available ground space in the right-of-way; then the net effect can be that none of that utility's poles within the public right-of-way may be used for wireless attachments. The Commission should clarify that any such blanket policies violate Section 224(f).

C. Allowing Utilities to Negotiate Terms in Agreements or Incorporate Standards that are at Odds with Section 224 and the Commission's Regulations Diminishes the Effectiveness of the Statute and the Rules.

Crown Castle respects the assertion made by the Commission in its OTMR Order that "parties are welcome to reach bargained solutions that differ from our rules."[90] Unfortunately, however, Crown Castle has encountered situations where the utility refuses to accept the Commission's rules as a baseline. Such a "negotiating" position has created a significant hardship on Crown Castle's ability to timely deploy its networks and in many cases results in exposing Crown Castle to significant economic risk in order to contract for pole attachment access.

As noted by CTIA, at the outset, the parties negotiating a pole attachment agreement, namely, the attacher and the utility, are not on equal footing. The utility is the pole owner; any terms and conditions it wishes to impose may effectively keep the attacher from deploying its facilities on the pole unless the attacher is willing to accept those terms and conditions or sign the agreement and sue under the operative rules. Filing a complaint, whether with the Commission or a state regulatory agency, is a very expensive and a time-consuming process. Moreover, it would place the Commission in the position of essentially mediating agreement negotiations. Many attachers do not have the resources to effectively file a complaint. Indeed, attachers have contractual deadlines for the deployment of their network facilities and cannot withstand the delay associated with filing a complaint and having it fully resolved. Moreover, filing a complaint after

[90] OTMR Order at ¶ 13.

construction has begun has the potential for slowing construction progress during the pendency of the complaint. As a result, attachers are often forced to accept terms and conditions they find untenable for purposes of securing attachment rights on utility poles. Even in situations where the terms do not on their face appear one-sided, they are often treated without regard for any mutually-beneficial indemnification.

In a number of pole attachment agreements, utilities have used their bargaining position to force Crown Castle to agree to terms like the following in order to attach its facilities to utility poles:

> Limitation of Liability. Unnamed Utility shall not be liable to Attacher for any loss or damage to the Attachments, including without limitation the loss of or interference with service of the system, arising in any manner out of Unnamed Utility's operations or its performance of make-ready work. In no event shall Unnamed Utility be liable to Attacher including without limitation, damages for lost profits.
>
> * * *
>
> Indemnification. Occupier shall indemnify, hold harmless and, at Unnamed Utility's option, defend, Unnamed Utility, its officers, agents and employees from and against any loss, damage, liability or cost (including without limitation reasonable attorneys' fees) for the following: (i) damage to property and injuries including death of all persons including but not limited to employees of Unnamed Utility and employees of Occupier, which may arise out of, result from or in any manner be caused by or related to the installation, maintenance, presence, use of removal of the Occupations from Unnamed Utility's poles, ducts and manholes, whether or not caused by Unnamed Utility's negligence, including without limitation Unnamed Utility's contributory negligence, concurring negligence, active negligence and passive negligence; (ii) loss or infringement of copyright, libel, slander or unauthorized use of information arising out of, resulting from or in any manner caused by or related to the operation of use of Occupier's system; (iii) Occupier's failure to secure required franchises, licenses, approvals and consents from Federal, state and municipal authorities and any necessary rights-of-way from owners of property; or (iv) infringement of patents with respect to the manufacture, use and operation of Occupier's equipment in combination with Unnamed Utility's equipment or otherwise. This paragraph shall survive termination of this Agreement.

In order to gain the "privilege" of attaching to the utility's infrastructure, attachers often have to release utility pole owners from nearly all liability for damage, death, or other circumstances that may occur, even if the utility or its employees or contractors are responsible for the damage, etc., that occurs. These types of requirements are at odds with the broad access rights, not privileges, that the Commission has sought to crystallize for attachers to utility infrastructure over the past twenty-five years.

To illustrate, in the past few months, claims involving damage to Crown Castle's facilities which were (a) attached to utility poles and (b) the utilities' actions or inactions led to the damage to Crown Castle's facilities have been denied based on the utilities' insistence of broad limitations on liability as a prerequisite for entering into a pole attachment agreement and thereby granting Crown Castle access to utility poles. The damages resulted in the following denials for claims made by Crown Castle to the utilities:

- Crown Castle recently spent over $10,000 to replace fiber when a malfunctioning transformer caused a power burn, destroying Crown Castle's fiber and strand and interrupting service for multiple customers. Although the cause of the power burn was the utility's malfunctioning transformer, the utility denied Crown Castle's claim based on the limitation on liability clause in the pole attachment agreement.
- In another example, Crown Castle recently spent over $100,000 repairing damage to its facilities attached to an investor-owned utility pole. In this instance, a fire started below ground in the utility's underground duct, catching its underground line on fire, which traveled vertically up the pole, burning the pole and damaging all attachments. The root cause of the fire, based on a fire investigation, was a surge that the utility's line was unable to handle. However, the utility denied Crown Castle's claim, citing the limitation on liability clause in the pole attachment agreement.

Unreasonable demands for limitations on liability significantly slow the pole attachment negotiation timelines and result in inappropriate shifts of liability and exposure to competitive carriers attempting to deploy communications facilities. They not only violate the Commission's rules but also general rules of public policy. However, because the pole owner has far more

leverage to secure favorable terms due to its sole control over access to its pole, attaching entities agree to these terms in order to secure timely access to the necessary utility poles. The Commission can help with this situation by issuing a clarification that its discussion of "bargained-for attachment solutions" in the OTMR Order only permits parties to customize an agreement within the bounds of the Commission's rules. Such negotiations cannot result in an agreement that conflicts with the procedures, timelines and requirements set forth in the Commission's rules.

Moreover, in spite of statutes and regulations prescribing attachment rates and calculation of the same, utilities sometimes attempt to circumvent regulated rates by claiming that a deviation in the regulated rate was bargained for by the parties and, as such, is reasonable. Because of the parties' bargaining positions, attachers have no reasonable ability to prevent imposition of an unreasonable, unregulated rate if there are other terms, such as make-ready timelines, liability, or other provisions that they are concerned about. Recently, Crown Castle encountered a utility in an FCC state whose agreement imposed an attachment rate with a multiplier for wireless attachments to the pole to account for not only the length of the attachment, but also the depth. Although the utility purported that the rate in the agreement "utilized" the FCC rate methodology, it actually took the rate derived by the FCC formula and multiplied that by the depth of the attachment, if greater than one foot. Crown Castle and others objected to this provision repeatedly, but the utility contended that it was a collaborative, bargained-for provision. The Commission should clarify that utilities may not include rates, terms, and/or conditions that unreasonably deviate from the FCC's (or other applicable regulatory authority's) rules in attachment agreements by representing that the rates, terms, and/or conditions are the result of collaborative, bargained-for exchanges between the parties.

D. Delays in the Development by Utilities of Standards or New Agreements to Account for Evolving Technology are Unreasonable Barriers to Access.

As a result of business needs, timelines for attachment of their facilities to utility poles are extremely important to third-party attachers. The Commission has taken this fact into consideration over the years, establishing and evolving its make-ready timelines. Unfortunately, a number of the processes that are deemed essential by utilities to attachment and make-ready, such as the development of standards for new equipment configurations or the development of agreements to account for a new deployment methodology, are not subject to particularized timelines. Because these processes are not subject to concrete timelines, they are often susceptible to abuse and lengthy delays, resulting in extremely unreasonable deployment timeframes and/or wholesale barriers to access.

By way of example, Crown Castle has been working with one utility for nearly a year to get the utility to finalize a standard for deployment of strand-mounted wireless facilities. Further complicating the issue, the utility will not make a determination about the applicable rates, terms, or conditions of attachment or how submissions for attachments shall be made and processed – meaning that Crown Castle cannot perfect an agreement with the utility. These examples highlight the barriers to access that utility indecision or delay can pose, resulting in extremely long timelines or quashed plans for deployment of critical communications services. Technology is ever evolving – that is one of the most exciting parts of the telecommunications industry. The Commission should clarify that the deployment of next generation technologies may not be unreasonably delayed by inadequate attention to this evolution by some utilities.

CONCLUSION

Because of the Commission's leadership, our nation's wireless infrastructure is better poised to facilitate major technological advances including the buildout of 5G networks and critical public safety improvements. As set forth in these Comments, by adopting the requested clarification and amendments to the 6409 Rules and ensuring fair access under Section 224, the Commission has an opportunity to continue its important work. For the foregoing reasons, Crown Castle encourages the Commission to adopt the relief requested in the Petitions.

Respectfully submitted,

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